**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

IMPLICIT, LLC,
          Plaintiff,
 	
v.
 	
IMPERVA, INC.
          Defendant.
	Case No. 2:19-cv-00040-JRG-RSP
	LEAD CASE

IMPLICIT, LLC,
          Plaintiff,
 	
v.
 	
JUNIPER NETWORKS, INC.
          Defendant.
	Case No. 2:19-cv-00037-JRG-RSP

**PLAINTIFF IMPLICIT, LLC'S SUR-REPLY IN OPPOSITION TO DEFENDANT
JUNIPER NETWORKS, INC'S REPLY IN SUPPORT OF ITS MOTION TO TRANSFER
VENUE TO THE DISTRICT OF DELAWARE (DKT. NO. 164)**

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I.   Introduction

Juniper has failed to make a sufficient showing that this case should be transferred to Delaware under the ██████████████ the forum-selection clause for two reasons: *first*, it has not shown that it has standing to invoke the clause as a third-party beneficiary; *second*, it has not provided enough evidence of a *bona fide* dispute such that the forum-selection clause applies. Alternatively, even if the Court were to find that the forum-selection clause applies, exceptional circumstances involving judicial economy justify denying Juniper's Motion to Transfer. Finally, even if the Court were to find that the forum-selection clause is enforceable, only certain claims would be subject ████████████████ forum-selection clause. In that situation, Implicit requests that those claims be severed into a new matter number and only that new matter be transferred to Delaware.

II.   Juniper Has Not Made the Predicate Showing that It Is an Intended Third-Party Beneficiary of the ███████████

To enforce the forum selection clause, Juniper must first show that it was an intended third-party beneficiary under Delaware law.[1] *See Madison Realty Partners 7, LLC v. AG ISA, LLC*, No. CIV.A. 18094, 2001 Del. Ch. LEXIS 37, at *5 (Del. Ch. Apr. 17, 2011) (reciting three-part test). Juniper has not made that showing. Juniper simply assumes that it is a third-party beneficiary, asserting that "these rights extended to both ███ as well as third-party beneficiaries." Mot, at 2. But, without more, Juniper's assertion is insufficient at this stage. *See ActiveVideo Networks, Inc. v. Verizon Communs., Inc.*, 694 F.3d 1312, 1336 (Fed. Cir. 2012) (finding "ambiguous language of the agreement" by itself insufficient to raise intended third-party beneficiary issue).

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[1] Delaware law applies to interpreting the ████████████, including if Juniper is a third-party beneficiary. ████████████████████████████ *Verde v. Stoneridge, Inc.*, 137 F. Supp. 963, 977 (E.D. Tex. 2015) ("[T]he Court applies [the law selected by the agreement's choice-of-law clause] in determining whether Mr. Verde is an intended third-party beneficiary . . . .").

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Juniper also has not shown that it is a third-party beneficiary under the language ████████

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████████████ Juniper has not provided evidence that Implicit had any potential claims against

it ████████████████ based on Juniper's status ████████████ at that time such that

Juniper would fall within the class of third-party beneficiaries ████████████████████

████████████ Indeed, Juniper concedes in Reply that its Motion is not based on the ████████

████████ *See* Resp., at 14; Reply, at 5.

Juniper instead argues that another ████████████████████████████████grants it

third-party beneficiary status. Reply, at 5. But ████████ does not mention—let alone grant—

third-party beneficiary status. Only ████████ mentions third-party beneficiaries, and Juniper

does not allege that it falls under ████████ Absent further evidence (which Juniper has not

provided), the natural reading of the ████████████████████████████████████

████████████████████████ *Fortis Advisors LLC v. Meds. Co.*, No. 2019-0236-KSJM,

2019 Ch. LEXIS 1405, at *9 (Ch. Dec. 18, 2019) (inclusion of a specific "third-party beneficiary"

definition excluded other). Because the Motion does not invoke ████████ it should be denied.

The real-world facts of this case further reinforce that Juniper is not a third-party

beneficiary that can step into ████████ It is undisputed that Juniper has not fulfilled the

conditions precedent to enforce the ████████, and Juniper concedes in Reply that it is not alleging

breach-of-contract claims. Reply, at 5. Nor is there any evidence that ███ is indemnifying Juniper

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in this case or ██████ believes that the ████████ has been breached such that Juniper is entitled

to enforce the ████████████████ . Juniper also admits that it received the ████████████

in 2011 in the prior *Implicit* litigation, Reply, at 5, and it did not seek to transfer that case based

on the forum-selection clause then. *See* Ex. A (N.D. Cal. Docket). And at least Juniper's co-

Defendant Fortinet alleges defenses based on the ████████████ and it has not invoked the

forum-selection clause. *See* Ex. B at 16 (Fortinet Initial Disclosures); Ex. C, at 36–37, 59–60

(Fortinet Responses to First Set of Common Interrogatories). This evidence confirms that the

clause does not apply.

III.   **Juniper Has Not Made a Sufficient Showing of a Dispute Regarding the** ████
         ████████

It is not enough that a Juniper product may contain an ████████████ to implicate the ████

████████ . The purpose of the ████████████████████████ It was not to extend rights

to third-parties that may use general-purpose ████████████ to run their own propriety software

where it is the operation of that propriety software that is alleged to infringe the claims. For that

reason, ██

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Juniper does not answer that question. Mr. Arruda's declaration states that the ████

████████ in some Juniper products are used "for flow-based processing." Dkt. 165-12, Arruda

Dec. But neither the declaration nor Juniper's now-amended interrogatory response explains what

they mean by "flow-based processing," how that processing is alleged to infringe, and how that

alleged infringement would not exist in the absence of an alleged ████████████████

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Nor does Juniper allege that Mr. Arruda has personal knowledge of what functionality the

████████████ actually perform in Juniper's products (the products contain multiple integrated

circuits). Tellingly, Juniper only asserts that Mr. Arruda has personal knowledge of the *source* of

the components in Juniper's products, Reply, at 2. But that does not answer the question of

whether the alleged infringement would exist or not in the absence of an ████████████

And Juniper certainly could have answered that question: its initial disclosures list individuals with

technical knowledge of how the products at issue work. *See* Ex. D, at 5 (Juniper's Am. Initial

Disclosures). Juniper did not provide evidence from those employees. And without that type of

evidence, Juniper cannot meet its burden to show that the ███████████████

████████ applies to this case given the specific language of ████████

IV.   Juniper's Implied License Defense Does Not Implicate the Forum-Selection Clause

Juniper's implied license defense does not provide a basis for transferring this case based

on the forum-selection clause. The right Juniper believes Implicit derogated when it filed this suit

is ██ But Implicit

does not (and did not) have that right to convey in the first place: "[A] patentee, by license or

otherwise, cannot convey an affirmative right to practice a patented invention by way of making,

using, selling, etc.; the patentee can only convey a freedom from suit." *TransCore, LP v. Elec.*

Transaction Consultants Corp., 563 F.3d 1271, 1275 (Fed. Cir. 2009). It is through that ████████

███████████████—an express provision—that Juniper's alleged rights flow. And it has

not shown under the ████████████ that the forum-selection clause applies.

V.   Exceptional Circumstances Weigh Against Transferring This Case to Delaware

Should the Court find that the forum-selection clause applies, it should still decline to

transfer this case. Even under Juniper's theory, it is undisputed that the ████████████ does not

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cover all of the accused products in this case (e.g., the SRX300 and SRX550 products). The

▮▮▮▮▮▮ also only applies to a subset of Implicit's claims. The asserted *Beauregard* claims fall

outside the clause's scope because they do not recite a "processor" limitation. In this situation,

where the forum-selection clause does not apply to all of a plaintiff's claims, courts have

recognized that judicial economy can warrant declining to transfer the case. *Axis Oilfield Rentals,*

LLC v. Mining, Rock Excavation & Contr., LLC, No. 15-1627, 2015 U.S. Dist. LEXIS 132860, at

*18 (E.D. La. Sep. 30, 2015). This reality provides a unique situation that weighs against transfer.

Further, this is a consolidated action that will involve the ▮▮▮▮▮▮ regardless of the

outcome of Juniper's motion. That is because Fortinet has allegedly raised the ▮▮▮▮▮ as a

defense and has not invoked the forum-selection clause. Transfer will thus frustrate judicial

economy because it would result in at least two courts addressing the common contract issues.

VI.   Implicit Respectfully Requests the Opportunity to Sever

Should the Court conclude that transfer is still warranted, Implicit respectfully requests that

the Court sever the asserted claims of the *Juniper* case that the Court concludes should be

transferred under the ▮▮▮▮▮▮ into a new matter number and transfer only that matter to

Delaware for adjudication. *See* FED. R. CIV. P. 21. This would provide Implicit the opportunity to

proceed with its claims against Juniper that do not implicate the ▮▮▮▮▮ under the current

schedule and in the current forum (as opposed to transferring the entire *Juniper* action, including

the allegations that do not implicate the ▮▮▮▮▮

VI.   Conclusion

For the foregoing reasons, Implicit respectfully requests that the Court denies Juniper's

Motion to Transfer. Implicit also respectfully requests that an oral hearing be held for this matter.

Date: January 6, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document and all attachments thereto are being filed electronically in compliance with Local Rule CV-5(a). As such, this document is being served this January 3, 2020, on all counsel of record, each of whom is deemed to have consented to electronic service. L.R. CV-5(a)(3)(A).

/s/ William E. Davis, III
William E. Davis, III

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